ONG BAN CHAI & ORS

v.

SEAH SIANG MONG

COURT OF APPEAL, KUALA LUMPUR
NH CHAN JCA
ABDUL MALEK AHMAD JCA
MOKHTAR SIDIN JCA
[CIVIL APPEAL NO: J-02-51-1997]
1 JUNE 1998

LAND LAW: *Sale of land - Sale of land to solicitor - Agreement for sale cum power of attorney - Allegation of fraud and conspiracy - Solicitor tranferring land to himself without paying any purchase money - Whether solicitor entitled to use power of attorney to effectuate transfer - Whether transfer fraudulent - Whether solicitor guilty of breach of trust and misrepresentation - Meaning of 'fraud' - National Land Code 1965, s. 340 - Contracts Act 1950, s. 17*

LAND LAW: *Sale of land - Sale of land to solicitor - Sale tainted with fraud, breach of trust and misrepresentation - Solicitor selling land to second purchaser - Whether second purchaser a bona fide purchaser - Whether acquiring good title to land - Whether knowledge of an unregistered interest in land could amount to fraud sufficient to defeat a registered proprietor's title - National Land Code 1965, s. 340(1),(2),(3)*

LAND LAW: *Sale of land - Bona fide purchaser - Prerequisites - Whether there should be absence of fraud, deceit and dishonesty - Whether must acquire land in good faith and for valuable consideration - Purchaser having prior notice of adverse claim to land - Non-payment of full purchase price at time of executing sale agreement - Whether of any consequence - National Land Code 1965, s. 340(1),(2),(3)*

LAND LAW: *Indefeasibility of title and interests - Indefeasibility of title - Whether purchaser a bona fide purchaser - Whether entitled to rely on conclusiveness of register document of title - Section 340(3) National Land Code 1965 - Whether would protect registered interest of a propritor who acquired the registered interest from previous registered proprietor - Whether would protect any purchaser who acquired title to land in good faith and for valuable consideration - National Land Code 1965, ss. 89, 340(1),(2),(3)*

The respondent is the proprietor of the half undivided share in three lots of land in the township of Johore Bahru ('the subject property') whilst the 1st appellant ('OBC') is an advocate and solicitor and a close friend of the respondent. By an agreement for sale cum a power of attorney executed on 26 February 1980 ('the 1980 Agreement'), the respondent undertook to sell his share in the subject property ('the half share') to OBC for RM409,735 payable on or before 26 February 1981, and also gave the latter authority to charge, transfer or sell the same. It was a term of the 1980 Agreement that, upon execution thereof, RM35,000 would be paid by OBC to the respondent.

OBC did not pay the RM35,000 consideration, and had also not completed the purchase of the half share. On 7 May 1986, acting upon the power of attorney given him by the 1980 Agreement, OBC effected a transfer of the half share to himself ('the 1986 transfer'), and later, had it charged to a bank for his own use and benefit. Subsequently, by an agreement dated 28 February 1989 ('the 1989 Agreement'), OBC, as registered proprietor of the half share, and purportedly also as attorney to Seah Swee Mong, the other proprietor of the subject property, sold the subject property to the 2nd and 3rd appellants for RM2,950,101. It was not disputed that upon signing the 1989 Agreement, the 2nd and 3rd appellants paid a deposit and not the full purchase price thereof.

The respondent subsequently became aware of the 1986 transfer and the 1989 Agreement, and by letter dated 12 April 1990, informed the 2nd and 3rd appellants that he intended to institute legal proceedings to vacate the 1986 transfer. The respondent then filed a suit against OBC and thereafter lodged private caveats on the whole of the subject property.

The 2nd and 3rd appellants knew about the claim that the respondent had staked on the subject property, but that notwithstanding, they went on to retain the 4th defendant firm of solicitors ('the 4th defendant') and proceeded to complete the purchase of the subject property. The result was that, on 20 March 1994, the respondent's caveats were removed by the Registrar of Titles, and on 10 May 1994, the subject property was registered in the name of the 4th appellant, the nominee of the 2nd and 3rd appellants. The respondent filed a second suit against the four appellants herein and the 4th defendant, challenging the 4th appellant's title to the subject property on the ground that it was not a *bona fide* purchaser for value, and seeking damages for fraudulent conspiracy.

OBC argued in the court below that there was consideration for the 1980 Agreement as the respondent was indebted to him for RM61,000 at the material time. He also asserted that time was never the essence of the 1980 Agreement, and that the respondent, in any case, had by conduct waived the payment period when he never demanded for the purchase price. The learned judge, having heard the suits together, ruled: (i) that the 1980 Agreement was not entered into for valuable consideration and was *void ab initio*; (ii) that OBC's title to the half share, having been obtained vide an invalid power of attorney, was not indefeasible in law; (iii) that registration of the half share in the name of OBC ought to be set aside; (iv) that the 2nd and 3rd appellants, and consequently the 4th appellant, were not *bona fide* purchasers considering that they had knowledge of the respondent's adverse claim and had not paid the full purchase price when executing the 1989 Agreement; and (v) that, although the respondent was entitled to claim damages agaisnt OBC for fraud, undue influence and breach of trust, his allegation of conspiracy to defraud was unsustainable, and no damage could flow therefrom. The facts also showed that the learned judge, in dismissing the conspiracy allegation, and the respondent's claim for damages, had made specific findings in favour of the 4th defendant and the appellants, in effect absolving them of any such wrong doing.

OBC and the 2nd to the 4th appellants appealed, whilst the respondent cross-appealed against that part of the judgment that dismissed his claim for damages for conspiracy. In so cross-appealing, however, the respondent had not appealed against or challenged the specific findings as made by the learned judge aforesaid. It was also evident that, notwithstanding that the 4th defendant had not appealed, and was not made a party to the present appeal by the four appellants, the respondent had nonetheless served his notice of cross-appeal upon the 4th defendant. Before the Court of Appeal herein, a preliminary objection was raised by the 4th defendant, contending that it ought not to be affected by the respondent's cross-appeal, whatever its outcome would be. And the following issues *inter alia* arose for the determination of the learned judges, namely: (i) whether OBC had acted fraudulently against the respondent in using the power of attorney to transfer to himself the half share; (ii) whether OBC, the 2nd appellant, the 3rd appellant and the 4th defendant had conspired to defraud the respondent of his undivided half share in the said land; (iii) whether the 2nd and 3rd appellants and their nominee the 4th appellant were *bona fide* purchasers of the said half share; and (iv) whether the 4th defendant's preliminary objection ought to be upheld.

Held:
Per Mokhtar Sidin JCA

[1] The preliminary objection ought to be upheld. By merely serving his notice of cross-appeal on the 4th defendant, the respondent could not make the 4th defendant a party to this appeal. The only way the respondent could make the 4th defendant a party to the present appeal was for him to file a new notice of appeal and name the 4th defendant as a respondent. The 4th defendant not being a party involved in or affected by the notice of cross-appeal served by the respondent, the said notice must be dismissed.

[2] The 1980 Agreement was in the nature of a sale and purchase agreement for valuable consideration to be completed within a period of twelve months. On the face of it the transaction did not appear to be unconscionable. There were however no provisions in it that authorised OBC to set off the purchase price against the debt owing by the respondent. Without any proper document to set off the purchase price against the friendly loans, OBC was not entitled to use the power of attorney to transfer the half share into his own name.

[3] OBC had transferred to himself the half share and charged the same to the bank for his own benefit without the knowledge and consent of the respondent, and without paying any purchase money to the respondent under the 1980 Agreement, thereby depriving the respondent of his interest in the property. By this overt act, OBC had committed fraud within the ambit of s. 17 Contracts Act 1950. The learned trial judge was right in law in finding fraud against OBC.

[3a] There was also sufficient evidence to support the learned judge's findings of undue influence and breach of trust committed by the OBC against the respondent. OBC was an interested party and the transaction clearly involved a conflict of interest. OBC ought to have advised and insisted that the respondent be represented by his own solicitor.

[4] The learned judge was right in holding that the respondent had failed to prove the conspiracy charge against the 4th defendant and the appellants. In any case, the failure of the respondent to appeal against the specific material findings by the learned judge meant that the respondent had accepted those findings which would have the legal effect of totally demolishing his charge of conspiracy to defraud. In short, this failure to appeal and challenge the specific findings of the learned judge was fatal to the respondent's case on conspiracy.

[5] Anyone making a title search on the date of the execution of the 1989 Agreement would only see the name of OBC as registered proprietor of the half share, and not the claim of the respondent on the register document. The 2nd, 3rd and 4th appellants were entitled in law to rely on the conclusiveness of the register document of title as provided under s. 89 of the National Land Code 1965 ('the Code').

[6] The caveats of the respondent were entered after the execution of the 1989 Agreement against the whole of the three lots of land whilst he claimed only one half of each lot. The caveats were therefore defective and could not remain on the register. The respondent in any case had not appealed against the removal or challenged it under s. 418(1) of the Code, and must be taken to have accepted the removal. With the caveats removed, the obstacle blocking the registration of the title in favour of the 4th appellant had likewise been removed.

[7] "Fraud" within the meaning of the Code means 'actual fraud' and not 'constructive fraud or equitable fraud'. There is thus no fraud on the part of a registered proprietor in merely acquiring title with notice of an existing unregistered interest.

[8] On the evidence, there was a total absence of dishonesty on the part of the 2nd, 3rd and 4th appellants as well as the 4th defendant. The learned judge, having found that "the plaintiff has failed to prove that the defendants have conspired to deprive him of his property" and that the removal of the caveats of the respondent was in order, should have found the title of the 4th appellant indefeasible and protected by s. 340(3) of the Code. He should also have held that knowledge of the respondent's adverse claim would not prejudice their case.

[8a] The two letters upon which the allegation of conspiracy was said to occur, namely the letter dated 12 April 1990 written by the respondent's solicitors to the 2nd and 3rd appellants and the letter of 10 May 1991 written by the 2nd and 3rd appellants' solicitors to OBC, did not show evidence of any fraud, not even constructive or equitable fraud, on the part of the 2nd and 3rd appellants. At the most the letters only showed knowledge on the part of the two appellants as to an adverse claim by the respondent to the half share in the land which had been registered in the name of OBC on 7 May 1986 free from encumbrances.

[9] The trial judge's decision that a person is not a *bona fide* purchaser until he has paid the full purchase price is based on the Court of Appeal judgment in *Aik Ming (M) Sdn Bhd v. Chang Ching Chuen,* which dealt with specific performance of a contract and applied s. 26 of the Specific

Relief Act 1950. The present appeal was not concerned with the question whether the court should grant specific performance of a contract of sale. In any case, the Federal Court in *Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen* had rejected the proposition that one is not a *bona fide* purchaser unless one has paid the full purchase price under a contract of sale. It is now clear that to be a *bona fide* purchaser one should have contracted in good faith for value, and that knowledge of adverse claim is not fraud.

[10] On the evidence, the title of the 4th appellant in respect of the half share was indefeasible under s. 340(3) of the Code. It was acquired in good faith and for valuable consideration from OBC as registered proprietor through the 2nd and 3rd appellants against whom the respondent had failed to prove conspiracy to defraud.

[11] Registration of the half share in the name of OBC should not be set aside. The learned judge had erred in law in ordering the half share to be registered in favour of the respondent. It was wholly unjust to penalise the 2nd, 3rd and 4th appellants for the fraud of OBC as well as the omission of the respondent himself to challenge by appeal the specific findings of the learned judge and on the removal of his caveats.

[12] In this case, damages could only flow from a finding of liability for conspiracy and/or misrepresentation on the part of the 2nd, 3rd and 4th appellants. The learned judge on these issues found in the appellants' favour and the 4th defendant was not even a party to this appeal. There was totally no foundation for the claim for damages. The learned trial judge was right in dismissing the respondent's claim for damages.

[Appeal of 1st appellant dismissed; appeal of 2nd, 3rd and 4th appellants allowed; cross appeal of respondent dimissed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

Responden adalah tuanpunya setengah bahagian yang tidak berbahagi dalam tiga lot tanah di bandar Johor Bahru. ('hartanah yang diperihalkan') sedangkan perayu pertama ('OBC') adalah seorang peguambela dan peguamcara serta rakan karib responden. Melalui satu perjanjian penjualan bersama surat kuasa wakil yang telah disempurnakan pada 26 Februari 1980 ('Perjanjian 1980'), responden telah mengakujanji untuk menjual bahagiannya di dalam hartanah yang diperihalkan itu ('setengah bahagian tersebut') kepada OBC bagi nilai sebanyak RM409,735 yang kena dibayar pada atau sebelum 26 Februari 1981, dan juga memberikan pihak terkemudian itu kuasa untuk menggadaikan, memindahmilik atau menjualnya. Ianya merupakan satu terma Perjanjian 1980 bahawa, setelah penyempurnaannya, RM35,000 akan dibayar oleh OBC kepada responden.

OBC telah tidak membayar balasan sebanyak RM35,000 itu, dan juga tidak menyelesaikan pembelian setengah bahagian tersebut. Meskipun demikian, pada 7 Mei 1986, bertindak atas surat kuasa wakil yang diberikan padanya oleh Perjanjian 1980, OBC telah menguatkuasakan satu pindahmilik akan setengah bahagian tersebut kepada dirinya ('pindahmilik 1986'), dan kemudiannya, telah menggadaikannya kepada sebuah bank untuk kegunaan dan kemanafaatannya yang tersendiri. Berikutan itu, melalui satu perjanjian bertarikh 28 Februari 1989 ('Perjanjian 1989') OBC, sebagai tuanpunya berdaftar setengah bahagian itu dan juga dikatakan sebagai wakil kepada Seah Swee Mong, tuanpunya yang lain hartanah yang diperihalkan itu, telah menjual hartanah yang diperihalkan itu kepada perayu-perayu ke-2 dan ke-3 bagi nilai sebanyak RM2,950,101. Adalah tidak dipertikaikan bahawa setelah menandatangani perjanjian 1989, perayu-perayu ke-2 dan ke-3 telah membayar satu deposit dan bukannya harga belian yang sepenuhnya.

Responden kemudiannya mendapat tahu mengenai pindahmilik 1986, dan Perjanjian 1989 itu, dan melalui surat bertarikh 12 April 1990, memaklumkan perayu-perayu ke-2 dan ke-3 bahawa beliau berniat untuk memulakan prosiding undang-undang bagi membatalkan pindahmilik 1986 tersebut. Responden kemudiannya telah memfailkan satu guaman terhadap OBC dan selepas itu telah menyerahsimpan kaveat persendirian di atas keseluruhan hartanah yang diperihalkan itu.

Perayu-perayu ke-2 dan ke-3 mengetahui mengenai tuntutan yang telah diisytiharkan oleh responden ke atas hartanah yang diperihalkan itu, tetapi meskipun begitu, mereka telah mengambil khidmat firma guaman defendan ke-4 ('defendan ke-4') dan meneruskan penyelesaian pembelian hartanah yang diperihalkan itu. Hasilnya adalah bahawa, pada 20 Mac 1994, kaveat-kaveat responden telah dibatalkan oleh Pendaftar Hakmilik, dan berikutan itu, pada 10 Mei 1994, hartanah yang diperihalkan itu telah didaftarkan atas nama perayu ke-4, nomini perayu-perayu ke-2 dan ke-3. Responden dalam keadaan itu, telah memfailkan guaman kedua terhadap keempat-empat perayu di sini dan defendan ke-4, dengan mencabar secara berkesannya hakmilik perayu ke-4 kepada hartanah yang diperihalkan atas alasan bahawa ianya bukan merupakan pembeli *bona fide* bagi nilai dan memohon gantirugi bagi komplot secara fraud.

OBC berhujah dalam mahkamah di bawah bahawa terdapat balasan bagi perjanjian 1980 kerana responden terhutang kepada beliau jumlah sebanyak RM61,000 pada waktu yang material itu. Beliau juga menegaskan bahawa masa tidak pernah merupakan intipati Perjanjian 1980, dan responden, dalam sebarang keadaan, telah dengan perlakuannya mengenepikan tempoh pembayaran apabila beliau tidak pernah menuntut harga belian tersebut. Hakim yang bijaksana, setelah mendengar guaman-guaman itu bersama-sama, telah

memutuskan: (i) bahawa Perjanjian 1980 telah tidak dimasuki bagi balasan yang bernilai dan adalah *void ab initio*; (ii) bahawa hakmilik OBC kepada setengah bahagian itu, setelah diperolehi melalui satu surat kuasa wakil yang tak sah, bukanlah tidak boleh disangkal di sisi undang-undang; (iii) bahawa pendaftaran setengah bahagian itu atas nama OBC seharusnya diketepikan; (iv) bahawa perayu-perayu ke-2 dan ke-3, dan kemudiannya perayu ke-4, bukannya merupakan pembeli-pembeli *bona fide* memandangkan bahawa mereka mengetahui mengenai tuntutan bertentangan oleh responden dan telah tidak membayar harga penuh ketika menyempurnakan Perjanjian 1989 tersebut; (v) bahawa walaupun responden berhak untuk menuntut gantirugi terhadap OBC bagi fraud, pengaruh tidak wajar dan pecah amanah, dakwaan beliau mengenai komplot untuk memfraud tidak dapat dipertahankan, dan dengan itu tiada gantirugi boleh berbangkit daripadanya. Fakta-fakta juga menunjukkan bahawa hakim yang bijaksana, dalam menolak dakwaan komplot, dan tuntutan responden bagi gantirugi, telah membuat keputusan khusus yang memihak kepada defendan ke-4 dan perayu-perayu yang pada hakikatnya membebaskan mereka daripada apa-apa perbuatan salah yang sedemikian.

OBC dan perayu-perayu ke-2 hingga ke-4 telah merayu, sedangkan responden telah merayu balas terhadap bahagian dalam penghakiman itu yang menolak tuntutan beliau bagi gantirugi kerana komplot. Dalam merayu balas sedemikian, walaubagaimanapun, responden telah tidak merayu terhadap atau mencabar akan keputusan khusus sepertimana yang dibuat oleh hakim bijaksana yang tersebut di atas. Ianya adalah juga jelas bahawa, meskipun defendan ke-4 telah tidak merayu, dan tidak dijadikan satu pihak kepada rayuan semasa oleh keempat-empat perayu tersebut, responden telah namun begitu menyampaikan notis rayuan balas beliau ke atas defendan ke-4. Dalam keadaan yang sedemikian, di hadapan Mahkamah Rayuan di sini, satu bantahan awal telah dibangkitkan oleh defendan ke-4 yang menegaskan bahawa ianya tidak seharusnya terjejas oleh rayuan-balas responden, hasil daripada apa pun yang berbangkit daripadanya, dan isu-isu yang berikut antara lainnya berbangkit daripada penentuan hakim-hakim yang bijaksana, iaitu: (i) samada OBC telah bertindak secara fraud terhadap responden dalam menggunakan surat kuasa wakil untuk memindahmilik setengah bahagian tersebut; (ii) samada OBC, perayu ke-2 dan ke-3 serta defendan ke-4 telah berkomplot untuk memfraudkan responden dari setengah bahagiannya yang tidak berbahagi pada tanah tersebut; (iii) samada perayu-perayu ke-2 dan ke-3 dan nomini mereka, perayu ke-4 merupakan pembeli-pembeli *bona fide* bagi setengah bahagian tersebut; dan (iv) samada bantahan awal defendan ke-4, dalam keadaan yang wujud seharusnya dipertahankan.

Diputuskan:
Oleh Mokhtar Sidin HMR

[1] Bantahan awak sepatutnya dipertahankan. Dengan hanya menyampaikan notis rayuan-balasnya ke atas defendan ke-4, responden tidak menjadikan defendan ke-4 satu pihak kepada rayuan ini. Satu-satunya cara responden boleh menjadikan defendan ke-4 satu pihak kepada rayuan semasa adalah dengan memfailkan satu notis rayuan yang baru dan menyebut defendan ke-4 sebagai responden. Oleh kerana defendan ke-4 bukannya merupakan satu pihak yang terlibat atau terjejas oleh notis rayuan balas yang disampaikan oleh responden, maka notis tersebut mestilah ditolak.

[2] Perjanjian 1980 adalah bersifat perjanjian jualbeli untuk balasan yang berharga, dan hendaklah disempurnakan dalam tempoh masa selama 12 bulan. Pada permukaannya transaksi tersebut nampaknya berpatutan. Walaubagaimanapun tidak terdapat peruntukan-peruntukan di dalamnya yang membenarkan OBC untuk menolak harga belian terhadap hutang yang terhutang oleh responden. Tanpa sebarang dokumen yang wajar bagi menolak harga belian terhadap pinjaman persahabatan, OBC tidak berhak menggunakan surat kuasa wakil untuk memindahmilik setengah bahagian tersebut ke namanya sendiri.

[3] OBC telah memindahkan kepada dirinya sendiri setengah bahagian tersebut dan menggadaikannya kepada bank untuk kemanfaatannya sendiri tanpa pengetahuan dan persetujuan responden, dan tanpa membayar apa-apa wang belian kepada responden di bawah Perjanjian 1980, yang dengan itu melucuthak responden akan kepentingannya dalam hartanah tersebut. Dengan perbuatan yang keterlaluan ini, OBC telah melakukan fraud dalam lingkungan maksud s. 17 Akta Kontrak 1950. Hakim yang bijaksana adalah benar di sisi undang-undang dalam memutuskan fraud terhadap OBC.

[3a] Terdapat juga keterangan yang secukupnya untuk menyokong keputusan Hakim yang bijaksana mengenai pengaruh tidak wajar dan pecah amanah yang telah dilakukan oleh OBC terhadap responden. OBC adalah pihak yang berkepentingan dan transaksi itu jelas melibatkan konflik kepentingan. OBC sepatutnya menasihatkan dan menggesa supaya responden diwakil oleh peguamcaranya yang tersendiri.

[4] Hakim yang bijaksana benar dalam memutuskan bahawa responden telah gagal untuk membuktikan tuduhan komplot terhadap defendan ke-4 dan perayu-perayu. Dalam sebarang keadaan, kegagalan oleh responden untuk perayu terhadap keputusan penting yang khusus oleh Hakim yang bijaksana bermakna bahawa responden telah menerima keputusan-

keputusan itu yang mana akan mempunyai kesan sah memusnahkan sepenuhnya tuduhan beliau mengenai komplot untuk melakukan fraud. Secara ringkasnya, kegagalan untuk merayu dan mencabar keputusan-keputusan spesifik hakim yang bijaksana adalah memudaratkan kes komplot responden.

[5] Sesiapa yang membuat carian hakmilik pada tarikh penyempurnaan Perjanjian 1989 akan hanya melihat nama OBC sebagai tuanpunya berdaftar setengah bahagian itu, dan bukannya tuntutan responden pada daftar hakmilik. Perayu-perayu ke-2, ke-3 dan ke-4 adalah berhak di sisi undang-undang untuk bergantung pada kemuktamadan daftar dokumen hakmilik sepertimana yang diperuntukan di bawah s. 89 Kanun Tanah Negara 1965 ('Kanun').

[6] Kaveat-kaveat responden telah dimasukkan selepas penyempurnaan Perjanjian 1989 terhadap ketiga-tiga lot tanah secera keseluruhannya sedangkan beliau menuntut hanya setengah bahagian setiap lot. Kaveat-kaveat tersebut adalah dengan itu tidak sempurna dan tidak boleh kekal pada daftar tersebut. Responden dalam sebarang kes telah tidak merayu terhadap pembatalan tersebut atau mencabarnya di bawah s. 418(1) Kanun, dan semestinya dianggap sebagai telah menerima pembatalan itu. Dengan terbatalnya kaveat-kaveat itu rintangan yang menghalang pendaftaran hakmilik tersebut atas nama perayu ke-4 telah disingkirkan.

[7] "Fraud" dalam maksud sebenar Kanun bermakna "fraud sebenar" dan bukannya "fraud konstruktif atau fraud saksama". Dengan itu tidak berlaku fraud oleh tuanpunya berdaftar dengan hanya memperolehi hakmilik dengan notis mengenai kepentingan yang wujud yang tidak berdaftar.

[8] Berdasarkan keterangan tidak terdapat ketidak-jujuran oleh perayu-perayu ke-2, ke-3 dan ke-4 dan juga defendan ke-4. Hakim yang bijaksana telah mendapati bahawa "plaintif telah gagal untuk membuktikan bahawa defendan-defendan telah berkomplot untuk melucuthak beliau daripada hartanya" dan bahawa pembatalan kaveat-kaveat responden adalah juga harus menurut aturan, sepatutnya telah mendapati hakmilik defendan ke-4 tidak boleh disangkal dan dilindungi oleh s. 340(3) Kanun tersebut. Beliau seharusnya juga memutuskan bahawa pengetahuan mengenai tuntutan bertentangan responden tidak akan memudaratkan kes mereka.

[8a] Kedua-dua surat di atas yang mana dakwaan komplot telah dikatakan berlaku, iaitu surat bertarikh 12 April 1990 yang telah ditulis oleh peguamcara responden kepada perayu-perayu ke-2 dan ke-3 dan surat 10 Mei 1991 yang telah ditulis oleh peguamcara perayu-perayu ke-2 dan ke-3 kepada OBC, tidak menunjukkan sebarang keterangan mengenai fraud, tidak juga fraud konstruktif mahupun fraud saksama, oleh perayu-perayu ke-2 dan ke-3. Paling tinggi, surat-surat tersebut hanya menunjukkan pengetahuan oleh kedua-dua perayu tersebut mengenai tuntutan bertentangan oleh responden kepada setengah bahagian tanah yang telah didaftarkan atas nama OBC pada 7 Mei 1986 bebas daripada bebanan.

[9] Keputusan Hakim perbicaraan bahawa seseorang itu bukannya merupakan pembeli *bona fide* sehingga beliau telah membayar harga belian sepenuhnya adalah berdasarkan penghakiman Mahkamah Rayuan dalam *Aik Ming (M) Sdn Bhd lwn. Chang Chng Chuan*, yang mana berurusan dengan perlaksanaan spesifik sesebuah kontrak dan memakai s. 26 Akta Relief Spesifik 1950. Rayuan semasa adalah walaubagaimanapun, tidak mempunyai perkaitan dengan persoalan samada mahkamah seharusnya memberi perlaksanaan spesifik akan sesebuah kontrak jualan. Walau apa pun, Mahkamah Persekutuan dalam *Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuan* telah menolak proposisi bahawa seseorang tidak menjadi pembeli *bona fide* melainkan seseorang telah membayar harga belian sepenuhnya di bawah kontrak jualan tersebut. Ianya kini jelas bahawa untuk menjadi seorang pembeli *bona fide* seseorang seharusnya memasuki kontrak dengan niat yang baik untuk nilainya dan bahawa pengetahuan mengenai tuntutan yang bertentangan bukannya fraud.

[10] Menurut keterangan, hakmilik perayu ke-4 berhubung dengan setengah bahagian tersebut adalah tidak boleh disangkalkan di bawah s. 340(3) Kanun. Ianya telah diperolehi dengan niat baik dan untuk balasan yang bernilai daripada OBC sebegai tuanpunya berdaftar melalui perayu-perayu ke-2 dan ke-3 terhadap yang mana responden telah gagal membuktikan komplot untuk memfraud.

[11] Pendaftaran akan setengah bahagian tersebut atas nama OBC tidak seharusnya diketepikan. Hakim yang bijaksana telah tersalah pertimbangan di sisi undang-undang dalam memerintahkan supaya setengah bahagian tersebut didaftarkan atas nama responden. Adalah juga sesungguhnya tidak adil untuk mendenda perayu-perayu ke-2, ke-3 dan ke-4 atas fraud yang dilakukan oleh OBC dan juga kegagalan oleh responden sendiri untuk mencabar melalui rayuan keputusan spesifik hakim yang bijaksana dan di atas pembatalan kaveat-kaveat beliau.

[12] Dalam keadaan ini, gantrugi hanya boleh terbit daripada keputusan tanggungan untuk komplot dan/atau salahnyataan oleh perayu-perayu ke-2, ke-3 dan ke-4. Hakim yang bijaksana berdasarkan isu-isu ini membuat keputusan yang memihak kepada perayu-perayu dan defendan ke-4 adalah bukan merupakan satu pihak kepada rayuan ini. Sesungguhnya tidak terdapat sebarang asas bagi tuntutan untuk gantirugi. Hakim yang bijaksana telah bertindak dengan betul dalam menolak tuntutan responden bagi mendapatkan gantirugi.

[Rayuan perayu pertama telah ditolak; rayuan perayu-perayu ke-2, ke-3 dan ke-4 dibenarkan; rayuan balas responden ditolak.]

Cases referred to:

Aik Ming (M) Sdn Bhd v. Chang Ching Chuen [1995] 3 CLJ 639 ***(cit)***
Ang Hiok Seng v. Yim Yut Kiu [1997] 1 CLJ 497 ***(refd)***
Assets Co Ltd v. Mere Roihi & Ors [1905] AC 176 ***(foll)***
Baron Akerhielm v. Rolf De Mare [1959] AC 789 ***(refd)***
Boonsom Boonyanit v. Adorna Properties Sdn Bhd [1997] 3 CLJ 17 ***(refd)***
Datuk Jagindar Singh & Ors v. Tara Rajaratnam [1983] 2 MLJ 196 ***(foll)***
Doshi v. Yeoh Tiong Lay [1975] 1 MLJ 85 ***(refd)***
Eng Mee Yong v. Letchumanan [1979] 2 MLJ 212 ***(refd)***
Goh Hooi Yin v. Lim Teong Ghee & Ors [1990] 2 CLJ 203 ***(foll)***
Land Executive Committee of the Federal Territory v. Sykt Harper Gilfillan Bhd [1981] 1 MLJ 234 ***(refd)***
Letchumy Arumugan v. N Annamalay [1982] 2 MLJ 198 ***(aff)***
M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor [1994] 2 CLJ 15 ***(refd)***
Mosbert Bhd v. Stella D'Cruz [1988] 1 MLJ 298 ***(refd)***
Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen [1998] 1 CLJ 792 ***(foll)***
Plenitude Holdings Sdn Bhd v. Tan Sri Khoo Teck Puat [1992] 4 CLJ 1882 ***(cit)***
Tai Lee Finance Co Sdn Bhd v. Official Assignee & Ors [1983] 1 CLJ 182 ***(foll)***
Teh Bee v. K Maruthamuthu [1977] 2 MLJ 7 ***(refd)***
Waimiha Sawmilling Co Ltd v. Waione Timber Co Ltd [1926] AC 101 ***(foll)***
WJ Alan & Co Ltd v. El Nasr Export & Import Co [1972] 2 All ER 127 ***(cit)***
Wu Shu Chen v. Raja Zainal Abidin Raja Hussin [1997] 3 CLJ 854 ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 17
National Land Code 1965, ss. 89, 258, 261(1), 323, 340(1), (2), (3), 417, 418(1), 433B, 433C
Rules of the Court of Appeal 1994, r. 8(1)
Specific Relief Act 1950, s. 26(b)

For the 1st, 2nd & 3rd appellants - Wong Kim Fatt; M/s Gulam & Wong
For the 4th appellant - Manjit Singh; M/s Gulam & Wong
For the respondent - Arthur Lee Meng Kwang (Yap Siong Cheng with him); M/s Arthur Lee & Co

[Appeal from High Court, Johor Bahru; Suit No: 22-90 of 1990]

Reported by WA Sharif

JUDGMENT

Mokhtar Sidin JCA:

The four appellants who are the defendants in the court below appealed against the decision of the learned trial judge of the High Court made on 17 December 1996. Originally at the High Court there were two civil suits, namely Civil Suit No. 22-90-1990 and Civil Suit No. 22-358-1994. In Civil Suit No: 22-90-1990 the respondents, Mr. Seah Siang Mong, was the plaintiff and the 1st appellant, Mr. Ong Ban Chai, was the defendant. In Civil Suit No. 22-358-1994, the respondent, was the plaintiff but there were five defendants, namely the four appellants in the present appeal and M/s Lim, Han & Teoh, a firm of advocates and solicitor (of which Mr. Y.Y. Han is senior partner), which is not a party in the present appeal. The learned trial judge gave decision in favour of the respondent and ordered, *inter alia,* one-half undivided share in the three lots of land which is the subject matter of this appeal (which was at the material time the half share that was transferred by the 1st appellant to the 4th appellant) be registered in the name of the respondent. It was also ordered that the 1st appellant to pay costs and damages to the respondent to be assessed by the Deputy Registrar of the High Court.

The respondent filed cross-appeal seeking variations of the decisions of the learned judge as follows:

1. The learned judge's dismissal of the respondent's claim for damages for fraud and/or misrepresentation against the appellants and the 4th defendant and the order that the respondent bears the costs of the 4th defendant ought to be reversed; and

2. The learned judge's dismissal of the respondent's claim that the transfer of the subject property to the 4th appellant was in contravention of ss. 433B and 433C of the National Land Code 1965 and therefore null and void and ought to be reversed.

Fourth Defendant's Objection On Cross-appeal By The Respondent

At the hearing of this appeal which took place on 11 August 1997, the learned counsel for the 4th defendant, Mr. Khoo Eng Chin, raised a preliminary objection on the following grounds:

1. His clients are not involved in the appeal and would not be affected by the cross-appeal.

2. There was a specific finding made by the learned trial judge that the respondent had failed to prove his case against his clients and there is no appeal against that specific finding and the dismissal of the respondent's claim against his client's claim based on that specific finding.

3. Any reversal of the learned trial judge's dismissal of the respondent's claim for damages for fraud and/or misrepresentation against the 2nd and 3rd appellants would not affect the learned trial judge's dismissal of the respondent's claim against his client.

Learned counsel for the respondent, Mr. Arthur Lee Meng Kwang, contended that by serving the notice of cross-appeal on the 4th defendant, it had become a party to the appeal.

After hearing the submissions by both parties on the preliminary objection we upheld the preliminary objection by the 4th defendant and dismissed with costs the respondent's notice of cross-appeal against the 4th defendant which is not an appellant or a party to the present appeal. We could not find any reason why the 4th defendant should appeal against the decision of the learned trial judge who had given decision in favour of the 4th defendant. The appellants in their appeal did not cite the 4th defendant as a respondent or a party to the present appeal. Rule 8(1) of the Rules of the Court of Appeal 1994 reads as follows:

> Rule 8.(1) It shall not be necessary for a respondent to give notice of appeal, but if a respondent intends, upon the hearing of the appeal, to contend that the decision of the High Court should be varied, he may at any time after entry of the appeal and not more than ten days after the service of him on the record of appeal, give notice of cross-appeal specifying the grounds thereof, to the appellant and any other party who may be affected by such notice, and shall file within the like period a copy of such notice, accompanied by copies thereof for the use of each of the judges of the Court.

By merely serving his notice of cross-appeal on the 4th defendant, the respondent does not thereby make the 4th defendant a party to this appeal. The only way the respondent can make the 4th defendant a party to the present appeal is for the respondent to file his new notice of appeal and name the

4th defendant as a respondent. As such we are of the opinion that the 4th defendant is not a party involved in or affected by a notice of cross-appeal served by the respondent.

It is to be noted that the respondent had not applied for leave to appeal against this order of ours.

Let us now turn to the main appeal itself.

On 12 August 1997, we dismissed with costs an application by the respondent to adduce before us fresh evidence. This evidence was available before the learned trial judge in the form of oral evidence to be given by the respondent's elder brother, Mr. Seah Swee Mong. The respondent had also not applied for leave to appeal against our decision on this application. Since we had dismissed the application we proceeded to hear the appeal. We had derived much assistance from the oral and written submissions of counsel for the various parties. We have the advantage of reading the written submissions made by the learned counsel in the Court below and the authorities cited to us. We took time to consider the submissions of the parties.

Facts

On 26 February 1980, an agreement of sale and irrevocable power of attorney (hereinafter referred to as the 1980 Agreement) was signed between the 1st appellant and the respondent before the attesting solicitor, Mr. Chew Whye Jee. It is not disputed that the sum of RM35,000 was not paid upon the execution and the respondent agreed that he was then indebted to the 1st appellant in the sum of RM61,000. The sale was in respect of three lots of land, namely (1) Lot 3287 C.T. 2092; (2) Lot 6081 C.T. 12970 and (3) Lot 6082 C.T. 12971, in the Township of Johor Bahru, measuring in area some 163,894 sq. ft. Both the respondent and his brother, Mr. Seah Swee Mong, inherited those three lots upon the death of their mother, each of them holding one-half undivided share. The respondent sold his half share to the 1st appellant. The other one-half undivided share belonged to Mr. Seah Swee Mong, brother of the respondent. Mr. Seah Swee Mong had also sold his undivided half share of those lots to the 4th appellant free from encumbrances.

Under the 1980 Agreement the respondent's undivided half share of those lots (about 81,947 sq.) was sold to the 1st appellant. The selling price was RM409,735 which works out at about RM5 per sq. ft. On the same day another agreement of sale and irrevocable power of attorney was signed by the respondent's elder brother, Mr. Seah Swee Mong, and the 1st appellant whereby Mr. Seah Swee Mong sold his undivided half share of the same land. This agreement and power of attorney was again attested by the same solicitor,

Mr. Chew Whye Jee. Mr. Seah Swee Mong's half share of the land had since been registered in the name of the 4th appellant free from encumbrances after the removal of the respondent's private caveats in 1994.

It was contended by the 1st appellant that for the period of April 1978 to July 1982, he had given a total sum of RM682,000 to the respondent as friendly loans. This, according to the 1st appellant, was evidenced by the various acknowledgments signed by the respondent, and the respondent had admitted in evidence they were friendly loans. The respondent also stated that the 1st appellant had never demanded for repayment because he was interested in the proposed 25-storey condominium project to be developed on the said land, through a joint-venture company by the name of Yang-Zhou Sdn. Bhd. There is no evidence to show that the respondent was allotted any share in this company. It is also clear that the 1st appellant had not issued any notice of demand to the respondent for repayment of the loans. The 1st appellant gave evidence that the proposed condominium project failed because of the poor market conditions in 1984. The 1st appellant also stated that since the respondent was unable to pay his debt, he and the respondent agreed orally to treat the friendly loans given to the respondent as a set-off against the selling price for the respondent's undivided half share in the said land. This was contradicted by the respondent who said that he had never agreed to that.

On 7 May 1986, the 1st appellant made use of the irrevocable power of attorney given by the respondent to him and transferred the half share of the respondent to himself (1st appellant). By a sale and purchase agreement dated 28 February 1989 (hereinafter referred to as "the 1989 Agreement"), the 1st appellant, as the registered proprietor of the undivided one-half share of the said land, and Mr. Seah Swee Mong for his undivided half share through the power of attorney given by him to the 1st appellant, sold the said land to the 2nd and 3rd appellants free from all encumbrances at the total price of RM2,950,101. It is not disputed that Mr. Seah Swee Mong received his full share of the purchase price in the sum of RM1,225,050.50 on 4 May 1991.

On 13 April 1990, the respondent's solicitors sent a letter dated 12 April 1990 to the solicitors for the 2nd and 3rd appellants, giving notice of intended proceedings to be taken by the respondent. On 5 May 1990, the respondent entered a private caveat against the said land. On 10 May 1991 the 4th defendant as solicitors for the 2nd and 3rd appellants wrote to the 1st appellant's legal firm. This letter will be referred to later. On 25 November 1991, the 2nd and 3rd appellants paid the balance of the purchase price to the 1st appellant.

It is common ground that the respondent's private caveats entered on 5 May 1990 on the said land were removed on 20 March 1994 by the registrar of titles. It is also common ground that on 10 May 1994 the said land was registered in the name of the 4th appellant. For the period from 1991 to 1996 the 2nd, 3rd and 4th appellants paid the quit rent on the said land and they had also paid the sum of RM630,500 to the occupiers of the said land for vacant possession.

The Issues In This Appeal

These are the three principal issues for determination in this appeal:

(1) Whether the 1st appellant had acted fraudulently against the respondent in using the power of attorney granted by the respondent to transfer his undivided half share to the 1st appellant himself.

(2) Whether the 1st appellant, 2nd appellant, 3rd appellant and 4th defendant have conspired to defraud the respondent of his undivided half share in the said land.

(3) Whether the 2nd and 3rd appellants and their nominee the 4th appellant are *bona fide* purchasers of the said undivided half share from the 1st appellant.

On 23 January 1998, we unanimously dismissed with costs the appeal of the 1st appellant. We unanimously allowed the appeal by the 2nd, 3rd and 4th appellants with costs here and below. We also dismissed the respondent's cross-appeal with costs. We now give our reasons for doing so.

First Issue: Whether 1st Appellant Fraudulent

The 1980 Agreement between the 1st appellant and the respondent was prepared by the 1st appellant. As can be seen from the document itself, it was a three-page agreement with six clauses. The power of attorney which is in cl. 4 covers half the Agreement. Clause 6 is the usual clause binding on successors in title and assigns. Nowhere it is stated in the Agreement that time is the essence of the contract. We have considered carefully as to what is the true nature of this document, where the respondent is described as the vendor and the 1st appellant the purchaser. For the purposes of this appeal it is necessary to reproduce cls. 1, 2, 3 and 5.

> 1. In consideration of the sum of Dollars Thirty-Five Thousand ($35,000.00) only paid by the Purchaser to the Vendor (the receipt whereof the Vendor hereby acknowledges), the Vendor as the sole Executor hereby agrees to sell, transfer and assign all his right, title and interest of and in the said properties to the Purchaser free from all encumbrances at RM5.00 p. sq. ft.

> 2. The balance of the purchase price shall be paid within twelve (12) months from the date hereof.
>
> 3. In the event that the State Government acquires the said properties or any part thereof, such acquired area should be deducted from the purchase price.
>
> 4. ...
>
> 5. Should the Purchaser fail to complete the purchase, the deposit of $35,000.00 shall be refunded to the Purchaser together with any other sums which may be advanced to the Vendor and this Power of Attorney shall be null and void.

Clause 4 as we have indicated is very lengthy and we are of the view that there is no necessity to reproduce it. It is sufficient for us to state that by cl. 4, the respondent "irrevocably appoints the purchaser as his true and lawful Attorney to enable the purchaser to deal with the said properties in all respects as if the purchaser were the owner thereof until the ownership of the said properties has been registered in the name of the purchaser and/or his nominees in the name or names of any subsequent purchaser or purchasers ...". The clause confers very wide powers on the 1st appellant as attorney, among them under (iv):

> (iv) In my name to sign and execute any contracts conveyances assignments transfers leases mortgages charges deeds and instruments whatsoever.

Looking at the 1980 Agreement, we are of the opinion that it in the nature of a sale and purchase agreement for valuable consideration to be completed within a period of twelve months. It is just like the sale agreement of Mr. Seah Swee Mong, which had been duly completed. Under the terms of the 1980 Agreement, the 1st appellant had a contractual obligation to pay the purchase price within the completion period of twelve months. On the face of it, the transaction does not appear to be unconscionable. We are fortified in our view by para. 2(3) of the grounds of the respondent, verified by his statutory declaration, when he applied for the entry of his private caveat on 5 May 1990 by which he caveated the whole of Lot 3287, Lot 6081 and Lot 6082. The respondent in para. 2(3) talks of the 1st appellant's failure to complete within the 12-month period. Paragraph 2(3) reads as follows:

> 2(3) The caveatee failed, neglected and/or refused to complete the purchase of my 1/2 undivided share within the stated 12 months from 26.02.80 stipulated in the said document.

The respondent gave evidence against the 1st appellant, whereby the respondent accused the 1st appellant of using undue influence, breach of trust and fraud. But one single overt act had assumed prominence and had overtaken the accusations of undue influence and breach of trust against the 1st appellant. That overt act is the transfer of the respondent's one-half undivided share in

the three lots of land by the 1st appellant to himself by using the power of attorney granted by the respondent and simultaneously charging it to the bank without the knowledge and consent of the respondent. The question is whether the 1st appellant's act constitutes fraud.

The definition of 'fraud' in s. 17 of the Contracts Act 1950 is very wide. Section 17 of the Contracts Act is as follows:

> 17. **Fraud**
>
> 'Fraud' includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:
>
> (a) the suggestion, as to a fact, of that which is not true by one who does not believe it to be true;
>
> (b) the active concealment of a fact by one having knowledge of belief of the fact;
>
> (c) a promise made without any intention of performing it;
>
> (d) any other act fitted to deceive; and
>
> (e) any such act or omission as the law specially declares to be fraudulent.

A distinction is drawn between criminal fraud and civil fraud in the recent Federal Court decision in the case of *Ang Hiok Seng v. Yim Yut Kiu* [1997] 2 MLJ 45, which will have a bearing on the standard of proof by the person alleging fraud. At p. 59, Mohd. Azmi FCJ in delivering the judgment of the Court said:

> From the wide definition of "fraud" under section 17 of the Contracts Act 1950, and as well as the leading authorities on the subject, where the allegation of fraud in civil proceedings concerns criminal fraud such as conspiracy to defraud, or misappropriation of money or criminal breach of trust, it is settled law that the burden of proof is the criminal standard of proof beyond reasonable doubt, and not on balance of probabilities. It is now well established that an allegation of criminal fraud in civil or criminal proceedings cannot merely be based on suspicion or speculation. In allowing the appeal in *Lau Kee Ko & Anor v. Paw Ngi Siu* the Federal Court reversed the judgment of the High Court on the finding of a civil fraud in a non-disclosure dispute wherein the plaintiff was led to think that he was contracting with the owner when in point of fact he was contracting with an agent. The fraud alleged was purely civil in nature and based on whether there was any personal consideration when the plaintiff entered into the contract, and on that basis the burden of proof was a civil burden. We agree with both counsel that to the extent that the general statement of the law in *Lau Kee Ko* is understood to mean a total rejection of the

> criminal burden in all cases of fraud, it is no longer good law. But where the allegation of fraud (as the present case) is entirely founded on a civil fraud and not based on a criminal conduct or offence, the civil burden is applicable.

In the present appeal before us, the evidence shows that the respondent had not terminated the 1980 Agreement when the 1st appellant failed to make full payment within the 12-month completion period. Neither had the respondent revoked the power of attorney at any time thereafter. Had he done so timeously, the 1st appellant would not be able to use it to transfer the land to his own name. The power of attorney was registered with the office of the Director of Lands and Mines, Johor Bahru, bearing registration No. P.A. Volume 106 Folio 55. According to the 1st appellant he did not pay the sum of RM35,000 on signing the 1980 Agreement as the respondent was owing him some RM60,000. It was contended by the 1st appellant that there was a waiver on the part of the respondent. In our opinion, it does not really matter whether there was a waiver or forebearance on the part of the respondent (see *W.J. Alan & Co. Ltd. v. El Nasr Export & Import Co.* [1972] 2 All ER 127 at p. 140; and *Plenitude Holdings Sdn. Bhd. v. Tan Sri Khoo Teck Puat* [1992] 2 MLJ 68). According to the evidence of the 1st appellant, he gave his last loan to the respondent to pay his monthly housing instalment on 28 May 1984. The 1st appellant stated in evidence as follows:

> I stopped because I was financially insolvent because I owe income tax for 12 years back taxes based on the discovery that I purchased the said property from the plaintiff.

There is no evidence to show that bankruptcy petition had been filed against him. The crux of the matter is that, when the 1st appellant got into this problem with the Inland Revenue in respect of his income tax, without the knowledge and consent of the respondent, and without paying any purchase money to the respondent under the 1980 Agreement, he transferred to himself the respondent's undivided half share in the three lots of land and charged that share to the bank on 7 May 1986 for his own benefit, thus depriving the respondent of his own interest in the property. We are of the opinion that by this overt act, the 1st appellant had committed fraud within the ambit of s. 17 of the Contracts Act 1950.

There are no express provisions in the 1980 Agreement to authorise the 1st appellant to deduct the purchase price from or set it off against the debt owing by the respondent to the 1st appellant. Without any proper document to set off the purchase price against the friendly loans to the respondent, the 1st appellant was not entitled to use the power of attorney to transfer the respondent's undivided half share into his own name. Further there is no evidence to show that both the 1st appellant and the respondent had

subsequently rectified the overt act. The two letters of 20 March 1990, in which the 1st appellant and the respondent agreed to the retransfer, for valuable consideration of the said share, in our opinion cannot be construed as documents of rectification. They do not absolve the 1st appellant from his wrongful act as nothing came out of these two letters. The 1st appellant is a practising advocate and solicitor who should know his duties and obligation. By his act he had abused the trust and confidence reposed in him as an advocate and solicitor by the respondent.

We respectfully are unable to accept the rather persuasive arguments of Mr. Wong Kim Fatt, learned counsel for the 1st appellant, advanced by him in his oral and written submissions on behalf of the 1st appellant because we could not find anything in the submissions to justify the wrongful act of the 1st appellant. Though Mr. Chew (the solicitor) gave evidence that he had explained the terms and conditions of the 1980 Agreement to the respondent before he signed it, the fact remains that at the material time he had no independent solicitor to advise and act for him in the transaction. It is common ground that Mr. Chew never acted as the respondent's solicitor. As the 1st appellant was an interested party and there was a conflict of interest, he should have advised the respondent and insisted that the latter be represented by his own solicitor, so that any fraudulent act or improper conduct could be avoided in the best interest of both the contracting parties.

The learned trial judge was, on the evidence, right in law in finding fraud against the 1st appellant. We agree with the observations of the learned judicial commissioner cited by the learned judge on the professional conduct of advocates and solicitors in *Letchumy Arumugan v. N. Annamalay* [1982] 2 MLJ 198 at p. 201:

> Where a party, especially an ignorant or illiterate one, is unrepresented by an advocate and solicitor in a transaction and the opposite party is represented by one, it is the duty of the advocate and solicitor to explain the terms and conditions of the contract and the legal consequences thereof fully and frankly to the unrepresented party and ensure that this unrepresented party understands the terms and conditions and legal consequences fully, so that neither of the contracting parties has any unfair advantage over the other. Where there is a conflict of interest, as in this case, the advocate and solicitor should advise the plaintiff to be separately represented. The advocate and solicitor must at all times maintain his professional ethics, honesty, integrity and independence. He should never abuse his special position and the confidence reposed in him if he is [to] maintain the public respect for and confidence in the legal profession.

There is sufficient evidence to support the learned judge's findings of undue influence and breach of trust committed by the 1st appellant against the respondent. We see no reason to interfere with those findings.

Second Issue: Conspiracy To Defraud

The respondent's evidence on conspiracy is not credible. When confronted with a direct question as to how the 4th defendant had conspired to defraud, the respondent answered as follows:

> When I met Mr. Han in mid 1993 he said I had a 50-50 win case against 2nd and 3rd defendants. I also feel that Mr. Y.Y. Han is protecting Ong Ban Chai also.

On the evidence we agree with the learned judge that the respondent had failed to prove his case against the 4th defendant. In this respect the learned judge in his judgment (where he referred to the 1st appellant as OBC) made his findings as follows:

> It is my finding that the plaintiff has failed to prove his case against the 4th defendant that -
>
> (a) they had full knowledge of OBC's alleged fraud and unlawful act; and
>
> (b) that they fraudulently and unlawfully conspired with OBC, the 2nd and 3rd defendants to perpetrate the alleged fraud and unlawful act of OBC.
>
> It is clear that the 4th defendant was not in the picture prior to the signing of the 1989 Agreement and on being retained by the 2nd and 3rd defendants, they took all proper and lawful steps which any reasonable and prudent solicitor would have done to carry out his client's instructions – there was nothing unlawful about the steps they had taken in the instant case.

It is significant to note that the respondent had not challenged the above specific findings of the learned judge as he did not appeal against such findings which are against his case. It is also significant to note that the learned judge found that the respondent had failed to prove the conspiracy charge against the 1st, 2nd, 3rd appellants and the 4th defendant.

The respondent had also not appealed against such specific findings of the learned judge on no conspiracy to deprive him of his property. The learned judge in his judgment said:

> On the whole it is my view that the plaintiff has failed to prove that the defendants have conspired to deprive him of his property. A tort by definition is an actionable wrong causing damage. The plaintiff has failed to prove that he suffered damage in relation to the charge of conspiracy and it is my finding that he is not entitled to the declaration that he has sought for on this charge.

Failure on the part of the respondent to appeal against the above specific material findings by the learned judge would inevitably mean that the respondent had accepted those findings which would have the legal effect of totally demolishing his charge of conspiracy to defraud. In other words, the 1st, 2nd and 3rd appellants and the 4th defendant had been cleared of the charge of conspiracy to defraud the respondent. Had there been an appeal against such an acquittal of conspiracy to defraud, we would be reluctant to reverse the findings of the learned trial judge on the evidence before us. In this connection, it may not be inappropriate for us to refer to the short passage in the judgment of Lord Jenkins in the Privy Council case of *Baron Akerhielm v. Rolf De Mare* [1959] AC 789. The passage appears at p. 806:

> ... Their Lordships would add that they accept, and would apply in the present case, the principle that where a defendant has been acquitted of fraud in a court of first instance the decision in his favour should not be displaced on appeal except on the clearest grounds (see *Glasier v. Rolls*).

Third Issue: Whether The 2nd, 3rd And 4th Appellants Are Bona Fide Purchasers

Learned counsel for the respondent contended that the 2nd, 3rd and 4th appellants are not *bona fide* purchasers as their minds had been infected by knowledge of the adverse claim of the respondent. He relied on the letter dated 12 April 1990 given by the respondent's solicitors and the letter of 10 May 1991 written by the solicitors for the 2nd and 3rd appellants to the 1st appellant. Learned counsel further contended that at the material time the 2nd, 3rd and 4th appellants had not paid the full purchase price to the 1st appellant and as such they could not be said to be *bona fide* purchasers. He relied on the case of *Aik Ming (M) Sdn. Bhd. v. Chang Ching Chuen* [1995] 2 MLJ 770.

It is clear to us that the 4th appellant is the nominee of the 2nd and 3rd appellants. As such the 4th appellant cannot succeed if the 2nd and 3rd appellants fail in their appeal. For reasons best known to themselves Mr. Wong Kim Fatt appeared as counsel for the 2nd and 3rd appellants while Mr. Manjit Singh appeared as counsel for the 4th appellant. It is convenient to take their arguments together. It was contended by them that at the time when the 1989 Agreement was executed, there was no caveat on those land and as such the 2nd and 3rd appellants were entitled to rely on s. 89 of the National Land Code 1965 ("the Code") on the conclusiveness of the register. It was also contended that both the appellants were *bone fide* purchasers for value and their nominee the 4th apellant is protected under the provisions of s. 340(3) of the Code, and the removal of the respondent's caveats was found to be in order by the learned judge. The 1st appellant had been fully paid his purchase

price and the 4th appellant had acquired indefeasibility of title when it became registered proprietor of the undivided half share on 10 May 1994. It was further contended that knowledge of adverse claim cannot defeat the registered title of the 4th appellant.

In our view, anyone making a title search on the date of the execution of the 1989 Agreement would only see the name of the 1st appellant as registered proprietor of the half share, and not the claim of the respondent on the register document. The 2nd, 3rd and 4th appellants are entitled in law to rely on the conclusiveness of the register document of title as provided under s. 89 of the Code, which is modelled on the Torrens System. In the case of *Teh Bee v. K. Maruthamuthu* [1977] 2 MLJ 7, a Federal Court decision, Ali Ag. CJ (Malaya) said at p. 12:

> ... The importance of the register document of title in terms of s. 178(3) of the Code read with s. 89 is that it is conclusive evidence that title to the land in question is vested in the appellant. ...
>
> There is also another much more important reason why this appeal should be allowed. Under the Torrens System the register is everything.
>
> So said S.K. Das on p. 102 of his book on the Torrens System in Malaya. I need only refer to two Privy Council cases, *Creelman & Anor v. Hudson Bay Insurance Company* and *Alan Frederic Frazer v. Douglas Hamilton Walker* which decided to the same effect.

The caveats of the respondent were entered after execution of the 1989 Agreement against the whole of the three lots of land on 5 May 1990, when he claimed only one-half of each lot. The caveats are therefore defective and cannot be allowed to remain on the register (see *Mosbert Berhad v. Stella D'Cruz* [1988] 1 MLJ 298). Had the respondent entered a valid private caveat before 28 February 1989 when the 1989 Agreement was signed, the situation might well have been different, for his private caveat on the register document would serve as a notice of his claim to an interest in the land to the world at large under s. 323 of the Code. Eventually, the validity of that claim would have to be determined judicially.

Lord Diplock, commenting on the doctrine of notice under the Torrens System of land registration and conveyancing as applied by the Code, made the following succinct and significant observation in the Privy Council case of *Eng Mee Yong v. Letchumanan* [1979] 2 MLJ 212 at p. 214:

> The system of private caveats is substituted for the equitable doctrine of notice in English land law.

In *Wu Shu Chen v. Raja Zainal Abidin bin Raja Hussin* [1997] 2 MLJ 487, the Court of Appeal affirmed the decision of the High Court in ordering the removal of the caveat which failed to disclose the 'certain document' notwithstanding it was entered in 1989 before Raja Zainal's purchase of the land in 1983. In the present appeal before us, the evidence shows that the respondent had not filed his appeal within the three-month statutory period under s. 418 of the Code against the act of removal of the caveats by the Registrar of Titles. During the trial the respondent had admitted under cross-examination sometime in September 1994 he was informed by his solicitors of the removal of the caveat in March 1994. He did not appeal against that act of the registrar to remove the caveats. With the removal of the respondent's caveats on 20 March 1994, the obstacle blocking the registration of the title in favour of the 4th appellant was also removed. If the respondent claimed that the removal of the caveats was done without notice to him and therefore done improperly, he should have availed himself of his statutory right of appeal under s. 418 of the Code for appropriate legal remedies as soon as he was informed of it by his lawyer. Section 418 reads as follows:

> 418(1) Any person or body aggrieved by any decision under this Act of the State Director, the Registrar or any Land Administrator may, at any time within the period of three months beginning with the date on which it was communicated to him, appeal therefrom to the court.
>
> (2) Any such appeal shall be made in accordance with the provisions of any written law for the time being in force relating to civil procedure; and the court shall make such order thereon as it considers just.
>
> (3) In this section "decision" includes any act, omission, refusal, direction or order.

The respondent must be taken to have accepted the removal of his caveats since he failed to challenge it under s. 418(1) of the Code when he had the opportunity. From the evidence of Mr. Y.Y. Han it is clear to us that the respondent was forewarned of the intention to remove the caveat before it was removed. There is no evidence of any attempt by the respondent to resist that removal. The three-month statutory period for appeal had long expired and we regret to say that it is far too late in the day for the respondent to challenge the act of removal of the Registrar of Titles: see *Land Executive Committee of the Federal Territory v. Syarikat Harper Gilfillan Berhad* [1981] 1 MLJ 234. The respondent cannot be allowed to take advantage of his own omission or default.

In our opinion, the learned trial judge, having found in his judgment that "the plaintiff has failed to prove that the defendants have conspired to deprive him of his property" and that the removal of the caveats of the respondent was

also to be in order, should have found the title of the 4th appellant indefeasible and protected by s. 340(3) of the Code. The learned judge in his judgment said:

> Looking at the above, I cannot see how the plaintiff can maintain his charge of conspiracy. The above acts by themselves are not unlawful neither were they brought by unlawful means. The fact that the defendants may have a motive for doing those acts is irrelevant. I would have thought that the 2nd and 3rd defendants have a right to intervene if they felt that at that time they had an interest in the subject property having entered into the 1989 Agreement. To me, there is also nothing to preclude them from filing a suit against OBC and Swee Mong for specific performance of the 1989 Agreement no matter what their motive was. Their act of removing the caveats would also be in order and I would have thought that they have every right to do so if they do it pursuant to the law. With regard to the 2nd and 3rd defendants' request for an adjournment of the plaintiff's application to strike out their statement of claim as co-plaintiffs I would think, that there is nothing unlawful about that – whether it will be granted would depend on whether the court feels that the situation merits it.

The unchallenged findings of the learned judge clearly show a total absence of dishonesty on the part of the 2nd, 3rd and 4th appellants as well as their solicitors.

As stated earlier, the respondent had failed to appeal against the specific finding of no conspiracy in favour of the appellants. This failure on the part of the respondent to appeal in order to challenge the specific findings of the learned judge is in our view fatal to the respondent's case of conspiracy, especially when one of the alleged conspirators, ie, the 4th defendant firm of solicitors, is not a party to this appeal. It will be wholly unjust to make an adverse order against this firm of solicitors when it is not a party to this appeal.

Now, we would like to refer to the letters upon which the allegation of conspiracy was said to occur. The first letter is the letter dated 12 April 1990 written by M/s Arthur Lee & Co. as solicitors for the Respondent to M/s Zaman & Associates, the former solicitors for the 2nd and 3rd appellant (Mr. Ong Chin Eng) and 3rd appellant (Mr. Toh Chiew Kwee):

M/s. Zaman & Associates

12.4.90

Dear Sirs,

Re: All those pieces of land held under C.T. 2092 for Lot 3287, C.T. 12970 for Lot 6081 and C.T. 12971 for Lot 6082 containing an area of 163,894.5 sq. ft. or thereabouts situate in the Township of Johor

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We are instructed that you act for Mr. Ong Chin Eng and Mr. Toh Chiew Kwee who have entered into an agreement with Mr. Ong Ban Chai @ Ong Ka Liew and another, Mr. Seah Swee Mong to purchase, *inter alia* Mr. Ong Ban Chai @ Ong Ka Liew's purported one-half (1/2) undivided share in the abovementioned property.

THIS IS TO PUT YOU ON NOTICE that we have been instructed by Mr. Seah Siang Mong of 115, Jalan Maju, Taman Pelangi, 80400 Johor Bahru to take the necessary legal proceedings to vacate the transfer of our client's one-half (1/2) undivided share in the abovementioned property into Mr. Ong Ban Chai @ Ong Ka Liew's name which said transfer was effected by Mr. Ong Ban Chai @ Ong Ka Liew without our client's knowledge (until recently), and purportedly by the use of a document which our client instructs us is invalid, null and void and/or in circumstances which would defeat Mr. Ong Ban Chai @ Ong Ka Liew's purported indefeasible title to the said one-half (1/2) undivided share.

Yours faithfully,

Sd.

c.c. Mr. Seah Siang Mong.

We have examined this letter carefully and found that in effect it is nothing more than a notice of an adverse claim which had to be proven in court. It did not allege fraud and was given after the 2nd and 3rd appellants had executed the 1989 Agreement.

The second letter we would like to reproduce is the letter dated 10 May 1991 written by the 4th defendant firm as solicitors for 2nd and 3rd appellant's to the 1st appellant's legal firm, M/s Ong Ban Chai & Co.

M/s. Ong Ban Chai & Co.

10-5-1991

Dear Sirs,

Re: Sale and Purchase of Properties held under C.T. 2092 Lot 3287, C.T. 12970 Lot 6081 and C.T. 12971 Lot 6082 all in the Township of Johor Bahru

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We refer to the telephone conversation between your Mr. Ong and our Mr. Han regarding the above matter.

We are pleased to inform you that our clients are agreeable to complete the sale and purchase of the abovementioned properties. However, in view of the facts that the said properties have now been encumbered by one Mr. Seah Siang Mong and there is a pending suit at the High Court over this matter, our clients have instructed us to find out from you whether you are prepared to accept our clients' terms and conditions as hereinafter specified before our clients agree to pay the full balance of the purchase price, *viz:*

1. The full balance of the purchase price shall be paid to you less the amount due to the income tax department which shall be retained by us.

2. Upon the full payment of the balance of the purchase price as aforesaid you shall execute a deed of assignment and an irrevocable power of attorney in favour of our clients authorising our clients *inter alia* to apply to the appropriate authorities for conversion, layout plan and building plans for the said lands.

3. The original title deeds shall be delivered to us for custody pending final registration of transfer of the same to our clients.

4. An irrevocable undertaking from you to refund the full purchase price of your undivided one-half share of the said lands in the event that the High Court should decide the pending civil suit against you.

Upon confirmation of the above we shall advise our clients to do the necessary actions.

Yours faithfully,

Sd.

c.c Mr. Ong Chin Eng & Mr. Toh Chiew Kwee.

Our reading of this letter is that the writer referred to the respondent's caveats of 5 May 1990 when using the words "encumbered by one Mr. Seah Siang Mong". The claim of the respondent against the appellant had yet to be proven in court. There is nothing in the letter to show that the 4th defendant and its client had personal knowledge of or actually participated in any fraud committed by the 1st appellant. The said letter showed prudence on the part of the 4th defendant firm to safeguard the interest of the 2nd and 3rd appellant who were its clients. Condition 4 appears to us to contradict any allegation of conspiracy and also the writer's personal knowledge of fraud of the 1st appellant. Further the letter stands to show that 2nd and 3rd appellants are *bona fide* purchasers. If the two letters were intended to show constructive or equitable fraud, they did not also advance the cause of the respondent. In respect of both we would like to refer to what Gill CJ said in the case of *Doshi v. Yeoh Tiong Lay* [1975] 1 MLJ 85 where at p. 88 he said:

> There is, however, an important exception to the above rule in cases of fraud, which is stated in *Halsbury's Laws of England* (3rd Edn) Vol. 14, para. 1019 at p. 543) as follows:-
>
> Under the head of actual notice is included notice to an agent employed in the transaction. The notice is imputed to the principal, and it affects him whether communicated to him or not; but an exception is admitted where there has been fraud on the part of the agent in the matter. Although actual communication to the principal is not required, yet fraud excludes in practice all probability of communication, and hence the knowledge of the fraudulent agent is not imputed to the principal.
>
> It is thus clear that his solicitor's knowledge of fraud, if any, cannot be imputed to the respondent. I must therefore reject the appellant's contention that if the respondent had notice by his agent of the previous transactions, then his entering into an agreement to purchase the premises was tantamount to fraud.
>
> It is contended for the appellant that if the respondent had knowledge by his agent of the illegality of the loan transaction and consequently of the transfer by Chooi Mun Sou to the Nominee Company being void, he cannot be a *bona fide* purchaser. The authority relied on for this contention is the old case of *Le Neve v. Le Neve.* But the doctrine of constructive notice, which is all that the respondent can be said to have had in this case, is inapplicable, as a rule, to systems of registration in relation to transactions where priority and notice are governed by priority in or the fact of registration. (See *14 Halsbury,* 3rd Ed. paragraph 1023 at page 545). Where the effect of constructive notice would be to invalidate a transaction in relation to sale of land, the court will not readily apply the doctrine. (See *14 Halsbury,* 3rd Ed. paragraph 1022 at page 545).
>
> ...

> It is next submitted on behalf of the appellant that questions as to the illegality or otherwise of the loan agreement and allegations of fraud and deceit cannot be decided on affidavits. But, as I have already said, there is no dispute as regards the facts of the case. There were no allegations of actual fraud on the part of the respondent. The learned judge had before him all the documentary evidence which is relevant to the case. It is to be observed that the loan agreement was made two years before the transfer of the premises to the respondent. It was in the light of all that evidence and on the legal arguments addressed to him on such evidence, that he had to decide whether the appellant was entitled to have leave to defend. I need hardly add that were the case to go to trial in court it would necessarily have to be decided on that documentary evidence and legal arguments arising therefrom. *The utmost that could be said against the respondent is that he is guilty of constructive or equitable fraud. But it is clear that "fraud" within the meaning of the National Land Code means actual fraud and not what is known as constructive or equitable fraud.* (See *Assets Co. Ltd. v. Mere Roihi and Tueh Guat Choo alias Ting Guat Choo (f) v. Cheah Ah Hoe and Yong Pow Meng*). (Emphasis is ours)

The Privy Council in *Assets Co. Ltd. v. Mere Roihi & Ors.* [1905] AC 176 held that 'fraud' in the Torrens System means 'actual fraud'. It was later held by the Privy Council in the leading and frequently cited case of *Waimiha Sawmilling Co. Ltd. v. Waione Timber Co. Ltd.* [1926] AC 101 that knowledge of pending litigation and adverse claim did not amount to fraud. These two cases were applied by the Federal Court in *Datuk Jaginder Singh & Ors. v. Tara Rajaratnam* [1983] 2 MLJ 196, where Lee Hun Hoe CJ (Borneo) said at p. 200:

> ... However, the Privy Council has made clear in *Assets Company Ltd. v. Mere Roihi & Ors.* that "fraud" in the Torrens system means 'actual fraud" and not "constructive or equitable fraud". ...

At p. 201 his Lordship said:

> ... In a subsequent case of *Waimiha Sawmiling Company Ltd. v. Waione Timber Company Ltd.* the Privy Council held that a registered proprietor who took a transfer with actual knowledge of an existing adverse claim against his transferor, acquired an indefeasible title as his mere knowledge of the existence of the adverse claim did not amount to fraud.

In *Tai Lee Finance Co. Sdn. Bhd. v. Official Assignee & Ors.* [1983] 1 MLJ 81, Abdul Hamid FJ (as he then was) held that fraud must be actual, not constructive or equitable. The learned judge at p. 85 said:

> As we stated earlier, the essential question that must be determined is whether the appellant was a party or privy to any fraud the chargor was guilty of. And the question is one of fact. The law is clear that the onus is upon the respondents to prove beyond any reasonable doubt that there was fraud, not constructive or equitable fraud but actual fraud. The appellant must be shown to be guilty of an act involving "dishonesty – a wilful and conscious disregard and violation of the right of other persons. *(Waimiha Sawmilling Company, Limited v. Waione Timber Company, Limited)*

In the present appeal we are of the view that the two letters did not show evidence of any fraud, not even constructive or equitable fraud on the part of the 2nd and 3rd appellants. At the most the two letters show nothing more than knowledge on the part of the 2nd and 3rd appellants of an adverse or rival claim by the respondent to the half share in the three lots of land which had been registered in the name of the 1st appellant on 7 May 1986 free from encumbrances.

It is interesting to note that in the present appeal before us, the arguments advanced on behalf of the respondent are somewhat similar to those advanced for the appellant some 70 years ago in the *Waimiha Sawmilling* case, where one Howe removed the caveat so that he could deal with his land. At the time of the registration of the dealing in the land, there was pending litigation affecting land. There was no appeal from the order discharging caveat, just like the present respondent who did not challenge by appeal the removal of his caveats. In discussing the appeal of the appellants in the Privy Council, Lord Buckmaster said at p. 104:

> The appellants support their case by two independent arguments: (1) That there was actual fraud committed in obtaining the registration of Wilson as the absolute owner. (2) That as at the date of this registration litigation was pending affecting the property, the title was necessarily subject to whatever rights the appellants would be held to possess if this litigation resulted in their favour.

The above two arguments are dealt with at p. 107 by his Lordship whose observations are directly relevant to the present appeal:

> ... Howe being prevented from dealing with his lands expressly removed the caveat in order that those dealings should not be delayed. Had that judgment been appealed against and the order of Sim J reversed, different considerations might have arisen, but it was left unchallenged, and all that Howe did was to act upon the hypothesis that it was sound and to attempt to strengthen the position as far as possible by speedy completion of the transaction. Even now no attempt has been made to question the judgment of Sim J, and that circumstance, in their Lordships' opinion, alone is sufficient; for the learned judge, with full knowledge of the facts, held that the hinderance to dealing with the property caused by the entry of the caveat should be removed, and

a even if he was wrong in the view that he took it seems to their Lordships impossible to say that people who acted upon the faith of that judgment were guilty of fraud.

The second question can be dealt with briefly. In their Lordships' opinion the judgment of Hosking J is complete and unassailable upon this point. Litigation b is the means by which a disputed interest in land can be established. If knowledge of the interest itself does not affect a registered proprietor knowledge that steps are being taken to assert that interest can have no more serious effect.

The *Waimiha* case was also applied by Edgar Joseph Jr. J (as he then was) in *Goh Hooi Yin v. Lim Teong Ghee & Ors.* [1990] 3 MLJ 23, where at p. c 32 he said:

The facts in the *Waimiha* case are noteworthy. There the registered proprietor of land, Howe, granted timber rights to the appellant which protected its agreement by caveat. Howe purported to determine the appellant's interest for breach of covenant. The appellant appealed against a judgment upholding d Howe's re-entry. While the appeal was pending, Howe sold the land to Wilson who was acting as agent for a company to be formed, the respondent. Howe obtained an order for removal of the caveat (against which the appellant did not appeal) and transferred the land to Wilson. Wilson later transferred the land to the respondent. The appellant's appeal against the judgment upholding Howe's re-entry was itself held.

e

Notwithstanding that Wilson knew of the appellant's claim and of the litigation between it and Howe, the Privy Council held that there had been no fraud on the part of the respondent.

f *The case shows that there is no fraud on the part of the registered proprietor in merely acquiring title with notice of an existing unregistered interest or in taking a transfer with knowledge that its registration will defeat such an interest.* (See also *Mills v. Stokman*). (Emphasis is ours).

We are of the opinion that the learned trial judge, having cleared the 2nd and 3rd appellants and also the 4th defendant of the conspiracy charge, should have g held that knowledge of the respondent's adverse claim would not prejudice their case, especially when he found that the removal of the respondent's caveats was in order. He should have held that the so called 'infection of the mind', if any, is curable in law and could not be a permanent impediment. In our opinion 'infection of the mind' cannot be infection by virus or bacteria, h in which event the patient should consult a doctor to seek a cure. In the present context, 'infection' must mean 'legal infection' of a sort in which the cure is by legal means in which the remedy is to be given by the courts, that is if the party concerned is entitled in law to such remedy.

i

The trial judge's decision that a person is not a *bona fide* purchaser until he has paid the full purchase price is based on the Court of Appeal judgment in *Aik Ming (M) Sdn Bhd v. Chang Ching Chuen* [1995] 2 MLJ 770 citing the judgment of Gopal Sri Ram JCA at p. 820:

> Now, I take two matters as settled law. The first is the proposition that one is not a *bona fide* purchaser until one has paid all one's money under the contract for sale. A person who pays only a deposit and, under the terms of a written or oral contract agrees to pay the balance later (in the present case after three months), is not a *bona fide* purchaser. I need only cite two authorities. The first is *Doshi v. Yeoh Tiong Lay* [1975] 1 MLJ 85. The second is *M & J Frozen Food Sdn. Bhd. v. Siland Sdn. Bhd.* [1994] 1 MLJ 294.

The Court of Appeal in the *Aik Ming* case by analogy applied s. 26(b) of the Specific Relief Act 1950, dealing with specific performance of a contract. Section 26 of this Act reads as follows:

> 26. Relief against parties and persons claiming under them by subsequent title.
>
> Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against -
>
> (a) either party thereto;
>
> (b) any other person claiming under a party to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract.

The present appeal is not concerned with the question whether the court should grant specific performance of contract of sale.

In *Doshi v. Yeoh Tiong Lay* [1975] 1 MLJ 85, Gill CJ (Malaya) (as he was then) delivering the judgment of the court held that the respondent there could not be said that he was not a purchaser for value because he had paid only 10 per cent of the purchase price. The learned Chief Justice at p. 88 said:

> It is said that the respondent cannot claim to be a purchaser for value without notice because he had not paid the full purchase price. The authority relied on for this assertion is the New Zealand case of *Morland v. Hales* and *Somerville* in which it was said that *Somerville* could not claim as purchaser for value without notice, as his contract had not yet been completed by payment of the purchase price and the conveyance of the legal estate. But here the legal estate was conveyed to the respondent by an instrument of transfer which was duly registered. It is true that he paid only 10% of the purchase price in cash, but he executed a charge on the property to secure payment of the balance of the purchase price. It therefore cannot be said that he is not a purchaser for value.

In M & J Frozen Food Sdn. Bhd. & Anor v. Siland Sdn. Bhd & Anor [1994] 1 MLJ 294, the first appellant company was the successful purchaser at a public auction sale. It paid 25 per cent of the purchase price but failed to pay into court the balance within the stipulated period of 30 days. The first appellant applied for and obtained an extension of time to pay the balance, but without naming the first respondent chargor as a party to its application for extension. The first appellant eventually paid the balance of the purchase price one year after the date of completion and became the registered proprietor of the land. The Supreme Court set aside the registration of the first appellant as proprietor, because failure to comply with ss. 258 and 261(1) of the Code was an illegality which struck, at the root of the chargor's to be heard. The default was clearly on the part of the first appellant purchaser which could not be allowed to benefit from its own default.

In the present appeal before us, the learned trial judge applied the *Aik Ming* case and his reasons in his judgment are as follows:

> Since the 2nd and 3rd defendants have only paid a deposit when they executed the 1989 Agreement and have yet to pay the balance of the full purchase price in May 1990, they are clearly not *bona fide* purchasers. Their minds have become infected with knowledge of the plaintiff's adverse claim and they were put on alert as to OBC's right to convey title of the subject property. Notwithstanding such knowledge, they proceeded to pay, as shown by their own evidence, through the 4th defendant, the balance of the purchase price and completed the transaction.

Is the trial judge correct in his interpretation of the *Aik Ming* case? We therefore need to consider what is the ordinary meaning of the expression *'bona fide'* as ordinarily used and understood. The meaning of the expression *'bona fide'* may be found in legal dictionaries, eg, *Stroud's Judicial Dictionary and Words and Phrases* and also in numerous judicial decisions. We found that the common factor in all *bona fide* transactions is the absence of fraud, deceit or dishonesty. In other words, they are entered into in 'good faith' for valuable consideration. The expression 'good faith' in English is used synonymously with the Latin expression *'bona fide'*.

In the present appeal before us, the material question is: when the 2nd and 3rd appellants entered into 1989 Agreement to purchase to purchase the three lots of land on 28 February 1989 having regard to the fact that the 1st appellant was on that date the registered proprietor of the half share of the three lots of land in question free of any trust and also free of any caveat by the respondent, did they acquire them in good faith and for valuable consideration? If the answer is in the positive, then the title of the 4th appellant indefeasible; if otherwise, the title is defeasible. With respect, we are of the opinion that s. 26(b) of the Specific Relief Act 1950 has no application to the present appeal.

For the purpose of this appeal, we are of the view that s. 340 of the Code in respect of indefeasibility of title is very important. We hereby reproduce s. 340(1), (2) and (3):

> 340.(1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.
>
> (2) The title or interest of any such person or body shall not be indefeasible -
>
> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
>
> (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or
>
> (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.
>
> (3) Where the title or interest of any person or body is defeasible by reason of the circumstances specified in sub-section (2) -
>
> (a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and
>
> (b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:
>
> Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

It was submitted by learned counsel for the 4th appellant that the 4th appellant is entitled to full protection under the proviso to s. 340(3) of the Code. This proviso is a special provision designed to protect the registered interest of the 4th appellant which acquired the registered interest from the previous registered proprietor who is the 1st appellant.

Section 340(1) and (3) received full judicial consideration in the recent Court of Appeal decision in *Boonsom Boonyanit v. Adorna Properties Sdn. Bhd.* [1997] 2 MLJ 62 where the court had the opportunity to consider and decide whether indefeasibility under s. 340(2) is deffered or immediate. Delivering the judgment of the court, Gopal Sri Ram JCA at p. 84 said:

> First, we are of the opinion that the proper approach is to interpret s. 340 of the Code as a whole, uninfluenced by any judicial or academic comment upon its effect. When read as a whole, the section makes it clear that, save in the limited cases enumerated in its second subsection, the title of a registered proprietor shall be indefeasible; that is to say, that it cannot be impeached. But such title, in the words of the legislature, 'shall not be indefeasible' in each of the instances set out in the second subsection to s. 340. This means that in each situation envisaged by the Code under s. 340(2), the title of a registered proprietor shall be defeated or, in other words, liable to be set aside.

On s. 340(3) at p. 85 his Lordship said as follows:

> It follows from what we have said in the preceding paragraph – and this is the fourth reason we advance for disagreeing with the learned judge – that s. 340 is constructed in such a fashion as to make defeasible only the title of the immediate acquire of land. The section, however, protects a purchaser who, in good faith and for valuable consideration, acquires title to land. It also protects the successors in title of such a purchaser. In our judgment, the words 'any purchaser' appearing in the proviso to s. 340(3) do not include a registered proprietor whose immediate title is rendered defeasible by one or more of the vitiating elements specified in the second subsection to s. 340 of the Code.
>
> Any other construction would, in our view, denude sub-s. (2) of all effect. The section should be read as making defeasible the title of a proprietor who gets onto the register by means of one or more of the methods specified in the second subsection. However, if such a registered proprietor were to dispose of the land to a third party who, in good faith, pays the purchase price, then, the latter, as well as all those who come into the register after him, take title free of any taint.

On the evidence, we are of the opinion that the title of the 4th appellant in respect of the one-half share of the appellant in the three lots of land is indefeasible under s. 340(3) of the Code. It was acquired in good faith and for valuable consideration from the 1st appellant as registered proprietor through the 2nd and 3rd appellants against whom the respondent had failed to prove conspiracy to defraud. Registration of the said one-half share in the name of the 1st appellant should not be set aside. The learned judge had erred in law in ordering the half share to be registered in favour of the respondent, to whom the learned judge had ordered the 1st appellant to pay costs and damages. In our opinion, although we sympathise with the predicament of the respondent, it is wholly unjust to penalize the 2nd, 3rd and 4th appellants for the fraud or the 1st appellants as well as the omission of the respondent himself to challenge by appeal the specific findings of the learned judge and on the removal of his caveats adverted to earlier in this judgment. In this connection we find the following passage from the judgment of Lord Diplock in the *Eng Mee Yong* case at p. 214 to be helpful in our consideration of the case of the 4th appellant in the present appeal:

> The Torrens system of land registration and conveyancing, as applied in Malaya by the National Land Code, has as one of its principal objects to give certainty to title to land and registrable interests in land. Since the instant case is concerned with title to the land itself their Lordships will confine their remarks to this, though similar principles apply to other registrable interests. By s. 340 the title of any person to land of which he is registered as proprietor is indefeasible except in cases of fraud, forgery or illegality, and even in such cases a *bona fide* purchaser for value can safely deal with the registered proprietor and will acquire from him an indefeasible registered title.

In coming to our decision, we had the advantage and benefit of the judgment of the Federal Court consisting of five judges in the case of *Pekan Nenas Industries Sdn. Bhd. v. Chang Ching Chuen.* At the time when the learned trial judge gave his decision and when this appeal was heard, the Federal Court had not delivered its decision yet. Before we made our decision, the judgment of the Federal Court in the *Pekan Nenas Industries* case was delivered. Learned counsel for the appellants, Mr. Wong Kim Fatt, drew our attention and the attention of the respondent's counsel, Mr. Arthur Lee, to this judgment. Mr. Wong Kim Fatt extended to us and Mr. Arthur Lee copies of the judgment which was reported at [1998] 1 AMR 169 without any submission to which Mr. Arthur Lee responded.

This case has been hailed to be a landmark judgment of the Federal Court where it rejected the proposition that one is not a *bona fide* purchaser unless one has paid the full purchase price under the contract of sale as propounded by the Court of Appeal in the *Aik Ming* case, on which the learned trial judge had based his decision. The Federal Court decided that to be a *bona fide* purchaser one should have contracted in good faith for value, and that knowledge of adverse claim is not fraud. The material time is the time of the transaction. We observe that the Federal Court found in favour of the intervener/purchaser, ie, the appellant company, which paid the balance of the purchase price when the second caveat was still subsisting. Delivering the judgement of the Federal Court, Edgar Joseph Jr. FCJ said at p. 207:

> The material time at which there must be knowledge or the means of knowledge is the time of entry into the transaction. (See *Kanssen v. Rialto (West End) Ltd.* [1944] Ch. 346; *Morris v. Kanssen* [1946] AC 459).

His Lordship had the opportunity to reaffirm in greater detail in the Federal Court his earlier views in the *Goh Hooi Yin* case in respect of *Waimiha Sawmilling* case.

On the effect of knowledge of litigation and adverse inference at p. 231 Edgar Joseph Jr. FJ said:

> In *Waimiha Sawmilling Co. v. Waione Timber Co. (ibid)*, shorn of side issues, the facts were these: H was the registered proprietor of land under the New Zealand Torrens system. He entered into a timber agreement with the appellant company, which the company protected by a caveat. Alleging breaches of covenant, H later purported to determine the interest of the company by re-entry on the land. The company contested the validity of the re-entry, and commenced litigation, which became protracted by appeals. While this litigation was pending -
>
> (a) the land was sold by H to an agent for the respondent company;
>
> (b) H obtained an order from a judge directing removal of the caveat; from this order no appeal was made; and
>
> (c) a transfer to the respondent company was registered.
>
> The litigation ultimately resulted in favour of the appellant company, with damages against H. Damages proving unavailing, the company sought to have the transfer set aside on the ground that the **taking of title in the face of pending litigation, and with knowledge of it, amounted to actual fraud on the part of the respondent.** Both the Supreme Court of New Zealand and the Privy Council **rejected this plea.** (Emphasis added)
>
> The *Waimiha Sawmilling* case is a good illustration of the proposition that the effect of notice of an unregistered interest may not amount to fraud sufficient to defeat a registered proprietor's title.

On the question of *bona fide* purchasers, his Lordship at p. 238 said:

> In our view, therefore, when, as here, there is a dispute between the immediate parties to a sale and purchase transaction, a *bona fide* purchaser is not necessarily one who has paid the full purchase price. Much will depend upon the particular circumstances of each case.
>
> We would, therefore, answer the question posed under point (2) in the negative; that is to say, we are unable to agree with the Court of Appeal regarding this part of the case.

The decision of the Federal Court is binding on us the Court of Appeal and the courts below. In a way the judgment in the *Pekan Nenas Industries* case has made the whole issue clearer and easier for us to make our decision.

In this present appeal, the respondent, in his cross-appeal, sought to reverse the dismissal by the learned trial judge on the claim for damages. Damages can only flow from a finding of liability for conspiracy and/or misrepresentation on the part of the 2nd, 3rd and 4th appellants. The learned

judge on these issues found in their favour, and the 4th defendant is not even a party to this appeal. Adverse to the case of the respondent, there is no appeal against the finding of no liability in favour of the appellants. There is therefore totally no foundation for the claim for damages. The learned trial judge was right on the evidence in dismissing the respondent's claim for damages and/or misrepresentation. His claim for damages must therefore be dismissed.

In respect of ss. 433B and 433C of the Code, these sections were not in issue at the trial, and they never arose at any time in the course of the trial. The issues for the trial were stated by the learned counsel for the respondent and the trial proceeded on that basis. He stated during his submission in the court below:

> Main issue in 1st suit is whether defendant had been fraudulent or not.
>
> 2nd issue – if he had been fraudulent whether he had conspired with 2nd, 3rd and 4th defendants and whether 5th defendant is a *bona fide* purchaser for value without notice.

It is too late in the day for the respondent to raise this issue before us. From the record before us, we are unable to find any evidence recorded by the learned trial judge of any contravention of the two sections in question. The Registrar of Titles saw it fit to register the transfer of the three lots of land in favour of the 4th appellant. The relief sought by the respondent must therefore be rejected.

For above reasons, we made the following orders:

1. The appeal of the 1st appellant, Ong Ban Chai, be is hereby dismissed with costs.

2. The appeal of the 2nd, 3rd and 4th appellants be and is hereby allowed with costs here and below.

3. The 4th appellant, ie, Bewell Realty Sdn. Bhd., be registered as proprietor in respect of the one-half (1/2) undivided share in the three (3) lots of land, namely Lot 3287 held under C.T. 2092, Lot 6081 held under C.T. 12970 and Lot 6082 held under C.T. 12971, Township of Johor Bahru, free from incumbrances.

4. The three (3) documents of title, namely C.T. 2092, C.T. 12970 and C.T. 12971, Township of Johor Bahru, deposited in this court be returned to M/s Gulam & Wong, the solicitors for the 4th appellant.

5. The cross-appeal of the respondent be and is hereby dismissed with costs.

6. The deposit of the 1st appellant be paid to the respondent towards account of taxed costs.

7. The deposits of the 2nd, 3rd and 4th appellants be refunded to them respectively.

We hereby direct the Registrar of Titles, Johor under s. 417 of the Code to give to our above third order forthwith.